State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel *and* Hotel and Restaurant Employees Union, Local 25, AFL–CIO. Case 5–CA–31346

July 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 19, 2004, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

I. INTRODUCTION

The complaint alleges that the Respondent's discharge of employee Luis Osorio violated Section 8(a)(1) of the Act. The judge found that Osorio was so discharged because he presented other employees' grievances to a supervisor. The Respondent, however, contends that it terminated Osorio because he violated the Respondent's rules regarding clocking in and out, misrepresented the time that he had worked, and later lied about this misconduct. We agree with the judge.

The analytical framework for determining when a discharge violates the Act was set forth in *Wright Line*, 251 NLRB 1018 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the discharge was motivated by the employee's protected concerted activity. To carry his initial burden, the General Counsel must show that the employee had engaged in protected activity and that the Respondent knew of the activity. The General Counsel also must establish that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence.[3] Thus, the timing of a discharge may support an inference of discriminatory motivation.[4] If the General Counsel meets this burden, the employer then bears the burden of showing that the discharge would have taken place even in the absence of the protected conduct. *Wright Line*, supra at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). Further, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

II. FACTS

Luis Osorio was a waiter in the Respondent's restaurant. On May 11, 2003,[5] Osorio was scheduled to work from noon until 10 p.m. He clocked in, but received permission to leave early (if he would return later that afternoon) from Ronald Linares, the restaurant manager. Osorio testified that he "forgot to clock out." He testified that he returned at 4:30 p.m., but did not clock in and did not work. Instead, he received permission over the phone by Linares, for his brother (Jaime Osorio) to work the remainder of his shift.[6] Linares told Osorio to wait until Jaime arrived before leaving. It appears that Osorio did not wait for his brother. Rather, he left immediately, and had his brother clock him out at 6:04 p.m. when his brother arrived. In any event, the timeclock

[1] In view of our disposition of the complaint's allegations, we find it unnecessary to pass on the General Counsel's motion to strike a portion of the Respondent's brief in support of exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. As to the Respondent's argument that the judge improperly credited one part, but discredited another part, of employee Luis Osorio's testimony, we note that "nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). Some of the Respondent's exceptions state or imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. After careful examination of the entire record, we are satisfied that this contention is without merit.

No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by soliciting its employees' grievances, by promising to remedy those grievances, and by threatening its employees that it would sell its business if they selected the Union as their collective-bargaining representative. Similarly, no exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by granting its employees various benefits alleged in the complaint, and that it did not violate Sec. 8(a)(3) by terminating Luis Osorio.

[3] *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

[4] Id. at 1282.

[5] All dates hereafter are 2003 unless otherwise indicated.

[6] Hereafter Luis Osorio will be referred to as Osorio, and Jaime Osorio will be referred to as Jaime.

showed that Osorio worked from noon until 6:04 p.m., when in fact he did not work at all.

Food and Beverage Manager Laura Gaige testified that she discovered on May 19 or 20, from the payroll report, that Luis Osorio had clocked out on May 11 at the very same minute that Jaime had clocked in. Within a couple of days, she and General Manager John Rish questioned both of the Osorios as to how this could have occurred.[7] Rish testified that the Osorios explained that Jaime punched in and went to the restaurant and that Luis then punched out. That, however, was an impossible scenario because of the time-clock's distance from the restaurant. Osorio testified that Rish told him that he would conduct an investigation and that Rish was "going to write [Osorio] up." Gaige testified that after speaking with Osorio she and Rish decided to investigate further because Osorio said that he had been excused from work by Linares, but was supposed to come back to finish his evening shift. She also testified that Osorio had said he had worked that day. Gaige also recalled that Osorio had said that "his brother was coming in to finish his shift for him."

An undated "Employee Communication Record" form was placed in Osorio's personnel file. According to Gaige, who completed the form, this was done shortly after she and Rish met with the Osorios. Rish acknowledged that the form is the same as that used for a written warning.

According to his credited testimony, Osorio on June 15 tried to enlist Front Desk Manager Mustafa Aouli's help in relating employees' grievances to the Respondent's parent corporation's human resource department. On June 19, Rish told Osorio that he was being terminated for his misconduct on May 11.

III. DISCUSSION

As to the first element of the General Counsel's *Wright Line* burden, establishing that Osorio engaged in protected concerted activity, the judge credited Osorio's testimony that on June 15 he requested Supervisor Aouli's help with communicating the employees' grievances to the Respondent's parent corporation.

The judge also found, by imputing Supervisor Aouli's knowledge to the Respondent, that the General Counsel established the Respondent's knowledge of Osorio's protected conduct. We agree. Aouli was clearly aware of Osorio's protected activity and, as Aouli was a supervisor, imputing his knowledge to the Respondent was appropriate. See *Dobbs International Services*, 335 NLRB 972, 973 (2001).

The judge further found, and we agree, that the General Counsel established the requisite element of the Respondent's animus against Osorio's protected activity. The judge noted that "where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised," citing *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). The judge found that such an inference could properly be drawn in this case and was reinforced "by the feebleness of the Respondent's excuse for the delay-action discharge of Osorio."

Osorio's misconduct occurred on May 11; however, he was not discharged until June 19. This was about a month after his meeting with Rish and Gaige regarding the misconduct. Significantly, it followed on the heels of his request for Aouli's assistance with the employees' grievances. Further, the judge found that, well before Osorio's termination, but shortly after Rish and Gaige had met with the Osorios, the Respondent had dealt with Osorio's May 11 misconduct by placing a written warning in his personnel file. Although the warning letter is undated, it had resolved the matter of Osorio's May 11 misconduct.

Our dissenting colleague concludes that the judge erred in finding that the General Counsel met his initial burden under *Wright Line*. He contends that the General Counsel failed to establish the requisite elements of the Respondent's knowledge of, and animus towards, Osorio's protected activity. We disagree.

First, as to the Respondent's knowledge of Osorio's protected activity, Aouli had such knowledge while Aouli was still in the Respondent's employ. Since Aouli was an agent of the Respondent at the time, his knowledge may be imputed to the Respondent. Of course, the Respondent could seek to rebut that imputation by showing that Aouli did not pass on this information to higher officials, e.g., Rish. The Respondent has not made that showing.

We recognize that Aouli left the Respondent's employ the day after he learned of Osorio's protected activity. However, there is no reason to assume, as our dissenting colleague does, that for Aouli to have reported Osorio's protected activities, Aouli had either to have gone out of his way to report that activity or have had animus towards that activity, or both. Aouli had knowledge of Osorio's protected activity while Aloui was still in the Respondent's employ, and the Respondent has failed to establish that Aouli did not pass on that information. The Respondent could easily have produced its managers to testify that Aouli did not do so. In these circum-

[7] The judge credited Osorio's testimony that this meeting occurred on May 14, although at times he appears to have relied on the date given by Gaige.

stances, imputing knowledge to the Respondent is fully warranted. See *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983).

The dissent states that "[g]iven the scant evidence of knowledge [of Osorio's protected activities on the part of Rish] . . . it is not at all clear whether the Respondent would have felt compelled to put on testimony in rebuttal or that any inference is warranted for its failure to do so." However, the imputation of a supervisor's knowledge of protected activity is not a novel concept; rather under well established case law Aouli's knowledge is imputed to Rish. See, e.g., id; *Dobbs International Services*, supra. Thus, the General Counsel met his burden of proving the element of knowledge. It is true, as the dissent notes, that the Board does not impute knowledge of protected activity in the face of credited contradictory testimony. However, for whatever reason, the Respondent here chose not to present Rish to testify that he did not receive word from Aouli.[8] Thus, we find that the Respondent failed to rebut General Counsel's showing in regard to the element of knowledge.

Our dissenting colleague finds that Rish denied that he had received word from Aouli. However, Rish denied only that he had heard rumblings that the food and beverage employees were dissatisfied and may have been talking about a union. That was not a denial that he had learned the substance of Aouli's conversation with Osorio. The entire line of questioning that led to the denial focused on the employees' union activity.[9] The only thing that can be said with certainty about Rish's denial is that it concerned his knowledge of employee dissatisfaction in connection with union activity.

In addition, the pretextual nature of the Respondent's reasons for Osorio's June 19, 2003 discharge supports an inference that the Respondent had both knowledge of Osorio's protected activity and animus towards that activity. See *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996), and cases cited therein (knowledge of protected conduct inferred from circumstantial evidence including a delay between cited misconduct and the discharge).

In regard to the element of animus, the Respondent discharged Osorio within a few days of his June 15 protected activity. The Respondent, however, contends that it discharged Osorio on June 19 for his misconduct, (i.e., a violation of the clock-in/clock-out rule) on May 11. The Respondent asserted certain reasons for its delay in discharging Osorio for his misconduct: alleged hindrances encountered in investigating the May 11 conduct and in determining whether a replacement for Osorio was needed.[10] However, the judge found that these explanations were not credible and not supported by the record.

Our dissenting colleague contends that the judge misread Rish's testimony regarding the reasons for the time lapse between the May 11 misconduct and Osorio's discharge. We disagree.

Rish testified that he wanted to meet with the Osorio brothers together, along with Food and Beverage Manager Laura Gaige. He stated that working out the schedules so that they could meet took time. The judge for various reasons (including Gaige's testimony that the meeting took place within a couple of days of her discovery of the questionable timeclock record) discredited this testimony. The judge also discredited Rish's testimony that the termination was also delayed by further investigation.

On the termination notice dated June 19, Rish wrote: "Falsif[ied] time card. Luis did not work on 5/11/03." Rish also wrote: "Luis is a good server. When confronted, he attempted to lie his way out. He came in, left, came back and clocked out. Witness[es] were Mustafa Aouli, Ellery, Sharif."[11] However, after the meeting with the Osorio brothers, Rish and Gaige already knew that Luis Osorio had not worked for at least several of the hours that he was on the clock, had not clocked out when he left the first time, had not clocked back in dur-

[8] At hearing the Respondent's counsel chose to rest, without presenting evidence, after the General Counsel had presented his case-in-chief. Thus, we must decide the case within the framework of *Wright Line*, based on the evidence presented.

[9] Although the Respondent did not present any witnesses, the General Counsel called Rish as a witness. The General Counsel questioned Rish as to when Rish had first heard of employees' union activity. Rish replied that he had heard some rumors but did not know about a specific campaign until he got the election petition. The General Counsel then asked if Rish would agree that he "had heard some rumblings about employees being interested in forming a union?" Rish replied that he had "heard rumblings that they were dissatisfied" and that they might look at union organization. Rish also testified that he had never heard anything about union organizing in the restaurant. Later, the following exchange occurred between Respondent's counsel and Rish:

> Q. Do you have any knowledge as to whether Mr. Osorio was a union supporter?
>
> A. None whatsoever.
>
> Q. Were you surprised when you received the union petition on July 11 that it included Food & Beverage employees?
>
> A. Yes, I was, specifically the restaurant employees.
>
> Q. You just testified that you heard rumblings that the employees in housekeeping were dissatisfied and may be talking about a union. Did you hear any such rumblings about the Food and Beverage employees?
>
> A. No.

[10] Rish testified that because Mahamadou Ly had been terminated earlier the restaurant would be down two servers and they had to consider whether they "needed to hire some more servers before [they] let Luis go." The judge discredited this testimony noting that Ly had been terminated 3 months before Osorio's termination.

[11] Ellery is a chef; Sharif is a waiter.

ing the afternoon, and that both of the Osorios had lied about their clockings in and out at 6:04 p.m.[12] Despite this the Respondent claims that after the meeting "Rish and Gaige decided to further investigate whether or not Osorio and/or Jaime had violated Respondent's rules with respect to time card recording."

There is no indication in Gaige's and Rish's testimony that further investigation revealed any information, other than that Osorio apparently had not worked after returning to the restaurant, as Ellery and Sharif stated that they had seen Osorio at the restaurant's bar sometime during the afternoon in street clothes.[13] However, neither Ellery nor Sharif could recall the exact time when they saw Osorio.[14] Furthermore, neither Rish nor Gaige gave a timeframe for any of the interviews or other steps that they testified to having undertaken in the investigation. In fact, as found by the judge, long before Osorio's termination, the Respondent had already dealt with Osorio's May 11 conduct by placing a letter in his personnel file. Although the warning letter is undated, it had resolved the matter of Osorio's May 11 conduct.[15] That resolution of the matter was changed after, and only after, Osorio's intervening June 15 protected activity. He was discharged on June 19, a few days after his protected activity. The conclusion is inescapable that the matter of Osorio's misconduct—long ago resolved—was resurrected because of Osorio's protected activity. The judge so found and we agree.[16]

Accordingly, we adopt the judge's conclusion that the Respondent discharged employee Osorio in violation of Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 31, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Introduction

Contrary to my colleagues, I would reverse the judge and dismiss the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by discharging server Luis Osorio. The General Counsel and the Respondent each argue that Osorio's discharge hinged on a single, albeit different, event. The General Counsel contends that the Respondent discharged Osorio because he complained to a former supervisor of the Respondent about perceived mistreatment of employees by management. The Respondent argues that it discharged Osorio because he knowingly failed to clock out, subsequently accepted 6 hours of pay for time he did not work, and then lied about it during an investigation of the incident. My colleagues agree with the General Counsel and the judge. I

[12] On brief the Respondent represents that Rish and Gaige had reviewed "The Sales and Tips Report" for May 11(dated as printed on May 19), before they interviewed the Osorios. The report did not show Osorio's name on the sheet for May 11.

[13] Also Osorio had not turned in a uniform for cleaning on May 11, although Rish admitted that this in itself did not prove that Osorio had not worn his uniform.

[14] The investigation confirmed that on May 11 Osorio had permission from Linares to clock out early after having clocked in at noon. Also, there is no indication in the record that Osorio did not have permission from Linares for Jaime to work in his place that evening.

[15] Our colleague contends that the warning only memorialized Rish's and Gaige's discussion with Osorio and does not indicate intent not to take further action if warranted after further investigation. However, as the judge found, the plain language of the warning and Gaige's unbelievable explanation for that language, demonstrate that the warning was the **final action** regarding the May 11 conduct. Thus, under the heading "Employee Action" Gaige wrote, "[o]n Sunday, May 11, 2003, Luis neglected to clock out when leaving property [sic] As he left early from his shift." The warning, under the heading "Performance Expectation," states that "Luis knows the importance of clocking in and out when leaving property and will continue to do so each time. Failure to do so will result in a suspension/termination." Gaige testified that the language under "Performance Expectation" was her "verbiage of it's pending investigation and upon investigation, if the results come out as such, termination or suspension will result." The judge discredited Gaige's testimony, noting that the language under "Performance Expectation" clearly referred to future conduct and not the May 11 matter.

Although Rish testified that his signing the warning indicated that he had approved the warning, he claimed that he did not remember the time frame or the context in which the warning was created.

[16] Our dissenting colleague relies on the terminations of employees Ryan De Los Trinos and Carmen Reyes to establish that Osorio was treated similarly to other employees who engaged in similar conduct. Assuming arguendo that our colleague is correct that the misconduct of De Los Trinos and Reyes was similar to that of Osorio, the Respondent dealt with Osorio's misconduct with the warning placed in his file shortly after the misconduct was discovered. However, after Osorio engaged in protected activity that misconduct was resurrected as a pretext for Osorio's termination.

Contrary to the implication of our colleague, we do not condone Osorio's misconduct. We find only that the misconduct was not the reason for his discharge.

respectfully dissent because the General Counsel failed to demonstrate by a preponderance of the evidence that when the Respondent discharged Osorio it knew of his protected activity or had animus toward it. Moreover, assuming arguendo that the General Counsel carried his burden to demonstrate that the protected activity was a motivating factor in the discharge, the Respondent met its rebuttal burden by showing that it would have discharged Osorio even in the absence of his protected activity.

Facts and Judge's Recommended Decision

On Sunday, May 11, 2003,[1] the Respondent scheduled Osorio to work from 12 until 10 p.m. After he clocked in at 11:57 a.m., Osorio sought and received permission from Restaurant Manager Ronald Lineres to leave work. However, Lineres conditioned his permission on Osorio returning at 4:30 p.m. for the dinner service, and mentioned that he would not be at the restaurant at that time. Osorio then left the premises without clocking out. The judge discredited Osorio's testimony that he returned to the restaurant as instructed, finding instead that Osorio took advantage of Lineres' absence to leave without intending to return. The judge further found that the witnesses who told Rish that they had seen Osorio at the restaurant during the afternoon of May 11 were either mistaken or lying. The judge concluded that Osorio's brother, Jaime, clocked Osorio out when he arrived for his shift shortly after 6 p.m.

The record shows that Laura Gaige, the Respondent's food and beverage manager, learned of the simultaneous clocking in and out no later than May 14 and reported the matter to General Manager John Rish, and that Gaige and Rish thereafter met with Osorio.[2] After listening to his explanation, the Respondent's officials told Osorio that they would investigate the matter further.[3] Such an investigation in fact took place. Rish interviewed at least four other employees who were at the restaurant on May 11. He also reviewed at least four different types of the Respondent's records. Rish concluded that Osorio did not work the time he claimed and that he lied about it during his meeting with Rish and Gaige. Consequently, approximately 5 weeks after the incident, on June 19, the Respondent terminated Osorio for not clocking out, overstating his hours, and lying about it when asked for an explanation.

The General Counsel's case that the Respondent unlawfully discharged Osorio is built on a single June 15 conversation between Osorio and Mustafa Aouli, the Respondent's front desk manager. On that date, Aouli worked from 3 until 11 p.m. It was his last shift as an employee for the Respondent. According to Osorio, Aouli quit because he was "very mad" about not receiving the position he applied for with the Respondent. Osorio asked Aouli about a restaurant employee who was threatened with discharge, and said that he and other employees wanted to meet with uppermanagement without front-line supervisors present to discuss the threat of discharge and other issues of employee concern. Osorio asked Aouli, whose English was better, to write a letter to that effect to uppermanagement. Initially, Aouli agreed to do so, but later that evening, he changed his mind and suggested that Osorio ask for the meeting directly by phone. Osorio never asked for the meeting or otherwise raised the issue with management.

The General Counsel introduced no direct evidence that the Respondent knew of Osorio's conversation with Aouli. Nonetheless, the General Counsel posited, and the judge agreed, that the Respondent learned of Osorio's conversation with Aouli and fired Osorio because of it.

Analysis

In *Wright Line*,[4] the Board set out the analytical framework for determining whether an employer has discriminated against an employee in violation of the Act.

> Under that framework, in which unlawful intent is an essential element, the General Counsel must first, by a preponderance of the evidence, make a showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. Only if the General Counsel makes such a showing, is the burden on the employer to demonstrate [by a preponderance of the evidence] that the same action would have been taken even in the absence of the protected conduct. Id. The ultimate burden remains, however, with the General Counsel. Id. at 1088 fn. 11.[5]

[1] All dates are in 2003.

[2] The judge credited Osorio that this meeting was on May 14. Gaige testified that she discovered the simultaneous clocking in and out on May 19 or 20, and there are portions of the judge's decision that can be read as using that time period for the meeting. It is not critical to determine whether the meeting was as early as May 14 or whether it was held approximately 1 week later. Osorio's testimony indicated that Rish and Gaige met with him only, although the judge, at fn. 15, said that the meeting included his brother Jaime. It was Gaige who testified the meeting involved both brothers.

[3] Osorio said that he "completely forgot to clock out." He also claimed in the meeting that he worked on May 11 but the Respondent's officials were skeptical of his story and indicated they would investigate it.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] See *Framan Mechanical, Inc.*, 343 NLRB No. 53 (2004), slip op. at 3–4 (footnote omitted).

To satisfy his initial burden of demonstrating discriminatory motivation, the General Counsel must show that Osorio engaged in protected activity, that the Respondent knew of Osorio's protected activity, that it exhibited animus toward that activity, and that there was a causal connection between the animus and the discharge.[6]

I find that the General Counsel failed to satisfy his initial burden because the evidence fails to establish that the Respondent knew of Osorio's protected activity - his conversation with Aouli—and harbored animus toward that activity.

With respect to knowledge, as mentioned above, no direct evidence exists that Rish, the decisionmaker, learned of Osorio's conversation with Aouli before he terminated Osorio. Aouli did not testify and neither Rish nor any member of management testified that they were aware of the conversation. The judge inferred knowledge but on a record that does not support such an inference.

It is true that a supervisor's or manager's knowledge of an employee's protected activity will "ordinarily" be imputed to the employer. *Health Care Logistics*, 273 NLRB 822, 823 (1984), affd. in relevant part 784 F.2d 232 (6th Cir. 1986). If, however, such knowledge is denied, "we will not impute knowledge of union activities where the credited testimony establishes the contrary." *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983). Accord: *Music Express East*, 340 NLRB 1063 (2004). Here, the circumstances militate against an imputation of employer knowledge.

The Osorio-Aouli conversation took place on the last day of Aouli's employment by the Respondent. Aouli was not leaving the Respondent on good terms. He was described by Osorio as "very mad" at management for not getting the position for which he had applied. Further, since Rish did not work the same shift as Aouli that day, the judge's inference rests on Aouli, a disgruntled departing employee, going out of his way to either call Rish before he left the restaurant for the last time or to contact him afterwards to report on a subordinate with whom he apparently had a good relationship. Such an event is made all the more improbable in the absence of evidence that Aouli was surprised by the conversation, considered it unusual or otherwise harbored animus toward employees bringing their complaints to management's attention.

The judge inferred knowledge based on the fact that Rish "fervently denied any knowledge of Osorio's union activities" but did not deny knowing that "before Osorio's discharge . . . he had presented employees' grievances to Aouli." At the hearing, the General Counsel called Rish as an adverse witness, but did not ask him whether he had knowledge of Osorio's conversation with Aouli. During the Respondent's attorney's cross-examination of Rish, the following colloquy took place:

> Q. Do you have any knowledge as to whether Mr. Osorio was a union supporter?[7]
>
> A. None whatsoever.
>
> Q. Were you surprised when you received the union Petition on July 11th that it included Food & Beverage employees?
>
> A. Yes, I was, specifically the restaurant employees.
>
> Q. You testified that you heard rumblings that the employees in housekeeping were dissatisfied and maybe talking about a union. Did you hear any such rumblings about the Food and Beverage employees?
>
> A. No.

The General Counsel argues that the judge correctly found that, while he denied knowledge of Osorio's union activities, Rish failed to deny that he knew of Osorio's discussion of employee grievances with Aouli. Given the scant evidence of knowledge presented by the General Counsel, it is not at all clear that the Respondent would have felt compelled to put on such testimony in rebuttal or that any inference is warranted from its failure to do so. Moreover, Rish, in fact, specifically denied, in the above-quoted testimony, hearing "any such rumblings" of discontent among food and beverage department employees—a denial that plainly encompasses any report concerning the substance of Aouli's conversation with Osorio.

I also disagree with the judge's finding that the General Counsel established that the Respondent harbored animus toward Osorio's protected activity. Again, the judge inferred this critical element of the *Wright Line* analysis in the absence of any direct evidence. The judge relied on two factors: the timing of the discharge (June 19), which occurred 4 days after Osorio's discussion with Aouli (June 15), and what he characterized as the insufficient "excuse" offered by the Respondent for the time it took to fire Osorio for his dishonesty.

In making this latter determination, the judge also found "entirely missing" any logic for the proposition that the Respondent's managers were unable to schedule a meeting among Gaige, Rish, and the Osorio brothers within "at least a week." This finding depends on the judge's misreading of Rish's testimony concerning the reason for the lapse of time between the May 11 incident

[6] Id., slip op. at 4 fn. 13.

[7] The General Counsel alleged that Osorio's discharge was also because of his union activities. The judge dismissed this allegation and there are no exceptions to that dismissal.

and Osorio's discharge. Rish testified that there were "two reasons" for the lapse of time. The first was that it took time to schedule and hold discussions with various individuals involved in the investigation. The second was that it took time to schedule a meeting among Rish, Gaige, and the two brothers. Rish did not offer the second reason as the sole basis for the time between the May incident and Osorio's June discharge, and the judge was in error in finding that he did so. Given that this was a busy restaurant with multiple shifts, the fact that it took some time to determine whether the facts supported a decision to terminate hardly seems to defy logic. After speaking to Osorio, the Respondent interviewed witnesses (as it had told Osorio it would do), and reviewed documents. In a timeclock violation incident similar to Osorio's, it took the Respondent approximately 3 weeks to conduct its investigation, an amount of time not inconsistent with that involved here. In that instance the lapse of time between incident and discipline was caused, according to Rish's testimony, by factors like those here: "[i]t took us some time to get the people that [the employee] said she spoke to versus the people that witnessed the incident to the point where we felt comfortable that we had the documentation in place that was necessary to warrant termination." In sum, the timing of Osorio's discharge is insufficient to demonstrate Section 7 animus.[8]

Assuming arguendo, however, that the General Counsel carried his initial burden, the Respondent satisfied its rebuttal burden by showing that it would have fired Osorio without regard to his conversation with Aouli. The Respondent fired three other employees for offenses similar to Osorio's. The Respondent terminated Joelaida Barcia after discovering that she allowed another employee to punch her in and out. It fired Carmen Reyes for knowingly violating timeclock policies. It discharged Ryan De Los Trinos for violating the timecard policy and not being truthful in the ensuing investigation. While the judge distinguished the discipline meted out to Barcia and another employee, Fabio Coutinho, on the basis that they were given individual warnings before receiving further discipline, such was not the case with employees Reyes and De Los Trinos. They were terminated without a prior warning.[9]

Theft, whether of money for hours not worked or of products not paid for, is a serious problem in retail establishments such as the Respondent's. The Respondent implemented and enforced rules to prevent such misconduct, and the record demonstrates that it applied those rules to conduct similar to Osorio's. I find nothing suspicious or unusual in the Respondent's efforts to investigate the misconduct before imposing discipline, nor do I consider it our province to second-guess an employer's judgment that theft and dishonesty constitute terminable offenses.[10] In short, the General Counsel failed to prove that the Respondent violated Federal law by disciplining Osorio for unquestionably dishonest disregard of its timeclock policies.

Dated, Washington, D.C. July 31, 2006

Peter C. Schaumber Member

NATIONAL LABOR RELATIONS BOARD

Stan P. Simpson, Esq., for the General Counsel.
Jonathan W. Greenbaum and *Gina Janerio Lisher, Esqs.*, of Washington, D.C., for the Respondent.
Devki K. Virk, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case, under the National Labor Relations Act (the Act), was tried before

[8] The judge further concluded that the Respondent knew all it "needed to know" once Gaige reviewed the timeclock records and she and Rish interviewed the Osorio brothers in May. He also pointed to an undated "Employee Communication Record" in Osorio's file signed by Gaige and Rish which stated about the May 11 incident that "[Osorio] knows the importance of clocking in and out . . . [and] [f]ailure to do so will result in suspension/termination." He concluded that this document reflected all the Respondent intended in response to what happened. Such conclusions are inconsistent, however, with the subsequent investigation the Respondent indisputably undertook. While the document memorializes management's communication with the employee, it does not evidence an intent to take no further action in the event management's investigation revealed that the failure to clock out was not an oversight but a deliberate effort to get paid for time not on the job.

[9] The judge also found disparate treatment in the Respondent's failure to discipline Osorio's brother Jaime who he found "equally culpable" in the May 11 incident. I disagree. One, while the judge found that Jaime clocked out for Osorio, there is no evidence management made the same finding. Two, Jaime clocked in and out accurately on May 11. He was not paid for time he did not work. Three, in the final analysis, the issue is not whether Jaime clocked his brother out or whether Osorio clocked himself out. The issue is whether Osorio received pay for over 6 hours he did not work as a result of his deliberately not clocking out, and whether he lied about it in the investigation. That is why he was fired.

[10] Indeed, theft has long been recognized as a cardinal offense and "just cause" for discharge in workplace arbitrations. See Arnold M. Zach & Richard I. Bloch, Labor Agreement in Negotiation and Arbitration, p. 232 (BNA 2d ed. 1995) ("[T]hey are what the law refers to as the *malum in se* category of offenses—"evil in themselves" such as theft or sabotaging equipment. There can be no serious argument of the gravity of such matters, almost without regard to the context.").

me in Washington, D.C., on February 18–19, 2004. On July 16, 2003,[1] Hotel and Restaurant Employees Union, Local 25, AFL–CIO (the Union), filed the charge in Case 5–CA–31346, contending that State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel (the Respondent) had violated Section 8(a)(1) and (3) of the Act by various acts and conduct.[2] After administrative investigation, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent had violated Section 8(a)(1) of the Act by soliciting employee grievances, promising employees increased benefits, and threatening employees, all in an effort to dissuade its employees from supporting the Union. The complaint further alleges that, in violation of Section 8(a)(3), the Respondent increased the benefits of its employees in various ways and that it discharged employee Luis Osorio, all in an effort to discourage employees from joining or otherwise supporting the Union. Finally, the complaint separately alleges that the Respondent violated Section 8(a)(1) by discharging Osorio because he concertedly complained to the Respondent about the terms and conditions of employment of the Respondent's employees. The Respondent duly filed an answer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[3] and after consideration of the briefs that have been filed, I enter the following findings of fact and conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

As it admits, at all material times the Respondent, a corporation with an office and place of business in Washington, D.C., has been engaged in the business of owning and operating a hotel and providing food, beverages, and lodging to its customers. In conducting those business operations during the 12-month period preceding the issuance of the complaint, the Respondent derived gross revenues in excess of $500,000, and it purchased goods valued in excess of $5000 directly from suppliers located at points outside the District of Columbia. Therefore, at all material times the Respondent has been an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Threat, Solicitation of Grievances, aAnd Grant of Benefits

The Union began an organizational attempt among some of the Respondent's employees during the spring of 2003, and it filed a petition for election with the Board on July 11. An election was held in September; the Union received a majority of votes cast. (The facts of just what date the election was held, and whether certification of representative issued, or whether bargaining has started, were not established in the record.)

Marleni Jiron, a housekeeping employee, testified that at time of trial she had been employed by the Respondent for 2 years. When asked by the General Counsel when she had first met John Rish, the Respondent's general manager, Jiron answered that it was in May 2003 "[I]n a meeting that he called" for the housekeeping employees. Jiron, who appeared with a translator, was asked on direct examination about the May meeting, and she testified:

> Q. Can you recall what was said out loud during the meeting by Mr. Rish?
>
> A. The first thing was in relation to the Union. ... He said that apparently he had received some sort of a paper that the Union will be present at the Hotel, or will be taken into the employees of the Hotel.
>
> Q. Okay. What else did he say?
>
> A. He had stated that if the Union would have access to the Hotel, the Hotel would be sold to the University.
>
> Q. What else did he say?
>
> A. We would have to pay a certain percentages to the Union.

(If the Respondent has some relationship with a university, the fact was not brought out at trial.) Jiron continued on direct examination to testify that Rish asked: "What was the problem? Why did we want to belong to the Union?" Jiron testified that she raised her hand and told Rish that the employees did not have enough linens to do their room-cleaning assignments. When asked what Rish replied, Jiron testified: "He was going to see whether the problem could be solved." The Respondent provides its employees with a free lunch or dinner during their shifts. When asked what other employee complaints were aired at the May meeting, Jiron responded that she (or another employee) complained that the food "wasn't any good." According to Jiron, Rish responded that he would see "if he could actually resolve that issue . . . [t]hat he wasn't aware at all what was happening with that issue." The housekeeping employees also complained that their daily assignments of 13 rooms to clean was overly burdensome. According to Jiron, Rish responded "that he might just reduce it by one room." Jiron further testified that, during her previous 2 years of employment with the Respondent, Rish had not conducted a meeting "like this" with the employees.

Jiron testified that after the May meeting with Rish, the food improved, the housekeeping employees were supplied with more linens, the room-cleaning assignments were reduced to 12 per shift, and the allowance for cleaning extra rooms was increased from $3 to 5.

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[1] Unless otherwise indicated, all dates mentioned are in 2003.

[2] Sec. 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Sec. 8(a)(1) provides that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) provides that it is unlawful for an employer "by discrimination . . . to encourage or discourage membership in any labor organization."

[3] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation and capitalization have been entered. Where I quote a witness who re-starts an answer, and that re-starting is meaningless, I sometimes eliminate, without ellipses, words that have become extraneous; e.g., "Doe said, I mean, he asked" becomes "Doe asked . . . All bracketed words have been inserted by me.

On cross-examination, Jiron readily acknowledged that the housekeeping employees had previously asked their supervisor, "Cecilia _____", to arrange a meeting with Rish. Jiron was not asked if she, or other housekeeping employees, told Cecilia why she, or they, wanted to meet with Rish.

The General Counsel called Rish as an adverse witness. Rish testified that "Adriana ____", a catering sales assistant who is bilingual, informed him in May that "Some people are starting to talk about contacting a union, you know, and they want to know how you feel about it." Rish replied to Adriana: "Okay, we'll call a meeting." Rish further testified that at the May meeting of the housekeeping employees he asked them "if they had any concerns that I could help with." Rish did not further dispute Jiron's testimony about what was said at the May meeting. Rish agreed that he thereafter reduced the room-cleaning assignments from 13 to 12. Rish further acknowledged that at the May meeting the employees complained that the then-existing allowance of $3.00 for cleaning an extra room was too low. Rish also acknowledged that, after the meeting, he increased the allowance to $5.00 per extra room. Rish further acknowledged that the housekeeping employees at the May meeting complained that they were not ever provided with free coffee in the cafeteria, and he admitted that after the meeting the free coffee was provided to them. (Another supervisor testified that, after the May meeting, the Respondent began to provide free coffee to the housekeeping employees at the beginning of each shift.) Rish further acknowledged that after the May meeting he ordered the head chef to provide better food (hot meals instead of sandwiches, fresher vegetables) for the employee meals. And Rish acknowledged that shortly after the May meeting the housekeeping employees were provided with more linen.On the basis of the above testimony, paragraph 6 of the complaint alleges that during the May meeting of housekeeping employees the Respondent, by Rish, in violation of Section 8(a)(1):

> (a) solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment, if they refrained from union-organizing activity; and
>
> (b) told employees that Respondent was better off selling its hotel if employees selected the Union as their exclusive collective-bargaining representative.

Paragraph 7 of the complaint alleges that in May the Respondent violated Section 8(a)(3) and (1) by:

> (a) reducing the number of room assignments per employee;
>
> (b) improving the food items provided to employees;
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> (c) providing employees with the necessary materials to accomplish their work assignments that had been previously withheld; and
>
> (d) paying employees extra wages for cleaning additional rooms.

In *Cogburn Healthcare Center*, 335 NLRB 1397 (2001), as it issued a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Board described an employer's threat to sell its business if its employees selected a union as their collective-bargaining representative as a "hallmark" violation of the Act.[4] Although Rish testified, and although he denied other misconduct, he did not deny telling Jiron and the other housekeeping employees that, should the Union be selected by the employees, "the Hotel would be sold to the University." On brief, the Respondent does not argue that this uncontradicted statement by Rish was anything other than a blatant threat in violation of Section 8(a)(1)[5] I found Jiron to be credible on the point, and I do find and conclude that the Respondent violated Section 8(a)(1) by Rish's telling the housekeeping employees in the May meeting that the Respondent would sell the Hotel if they selected the Union as their collective-bargaining representative.

Rish admitted that Adriana told him that the housekeeping employees wanted the May meeting because "[s]ome people are starting to talk about contacting a union, you know, and they want to know how you feel about it." Therefore, there is no question that the purpose of the meeting was to announce the Respondent's response to the organizational attempt that had recently begun. Jiron testified that during the May meeting, Rish asked the housekeeping employees, "What was the problem? Why did we want to belong to the Union?" Rish, himself, testified that, "I asked if they had any concerns that I could help with." Accordingly, it is clear that the Respondent was soliciting employees' grievances when Rish conducted the May meeting.

The Respondent defends its action on 2 principal grounds. The Respondent first contends that Rish had a long-standing practice of soliciting employees' grievances and that the May meeting was just another instance of that practice. The only evidence that the Respondent advances in support of this contention is a single answer that Rish gave to the General Counsel when the General Counsel asked if the May meeting were not the first that he had ever conducted. Rish replied to that question:

> We have had meetings for Housekeeping Appreciation Week. I frequently go down to the Housekeeping Department at the beginning of the shift to say "Good morning. Is there anything you would like to share with me? Do you have any concerns?" And so on and so forth.

This single answer is hardly probative evidence on the point. There was no explanation of when "Housekeeping Appreciation Week" was or what was then discussed. Rish's testimony that he "frequently" asks the housekeeping employees if they have any concerns was simply unbelievable. As well as having a particularly hollow ring to it, the testimony was not corroborated by any housekeeping supervisor (or anyone else) who would have been present. Moreover, Rish did not testify that he visited any other department of the Hotel (e.g., restaurant, front desk, and maintenance) to solicit employee grievances, and there is no reason why he previously would historically have singled out the housekeeping department for such attention. Second, the Respondent contends that it cannot be held to have unlawfully solicited grievances at Rish's May meeting of

[4] See also, *Elyria Foundry Co.*, 321 NLRB 1222 (1996), and *Storer Communications*, 287 NLRB 890 (1987).

[5] In fact, although the brief quotes the allegation of par. 6(b) of the complaint, it does not mention it thereafter—a telling admission.

housekeeping employees because the employees requested the meeting. Rish, however, testified that Adriana told him that the employees wanted the meeting because "they want to know how you feel about it [the Union]." Adriana did not tell Rish that the employees wanted to express their grievances. Grievances were not brought up until Rish called the employees together and asked "What was the problem? Why did we want to belong to the Union?," as Jiron credibly testified.

This conduct by Rish was a solicitation of grievances, with an implicit promise to rectify such grievances, in order to thwart the Union's organizational attempt. As the Board stated in *Flexsteel Industries, Inc.*, 316 NLRB 745 fn. 1 (1995):

> [W]e note that an employer's solicitation of grievances during a union organizing campaign carries with it an inference that the employer is implicitly promising to correct the complaints it discovers. This inference is applicable in this case, and the respondent did not rebut it. See, e.g., *Coronet Foods*, 305 NLRB 79, 85 (1991), enfd. 981 F.2d 1284 (D.C. Cir. 1993); *Uarco, Inc.*, 216 NLRB 1, 1-2 (1974).

Not only has the inference not been rebutted in this case, the Respondent has, in fact, fortified the inference by granting remedy to the employees' grievances that they expressed at the May meeting about workload, pay and other benefits. Accordingly, I find and conclude that, by soliciting employee grievances and promising to remedy those grievances in order to dissuade the employees from accepting the Union as their collective-bargaining representative, the Respondent violated Section 8(a)(1), as alleged in the complaint.[6]

Resolution of the allegations of paragraph 7 of the complaint, that the Respondent violated Section 8(a)(3) by granting benefits to employees in order to discourage them from joining or supporting the Union, turns on proof of the Respondent's motivation. Under the causation test of *Wright Line*,[7] the General Counsel bears the initial burden of showing that the grants of benefits were motivated, at least in part, by antiunion considerations. The General Counsel can meet this burden by showing that employees were engaged in union activity, that the employer was aware of the activity, and that the employer harbored animosity towards the Union or union activity. Once this showing has been made, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.[8]

In May, Adriana told Rish that the employees wanted to meet with him in order to find out how he felt about the Union. And Jiron testified that Rish asked the housekeeping employees at his May meeting why they wanted a union. Therefore, there can be no doubt that the Respondent knew about the union activities of the housekeeping employees before the admitted grant of benefits. Also, the General Counsel adduced the plainest evidence of animus toward those activities by proving Rish's undisputed, blatant, hallmark, threat to the housekeeping employees that the Respondent would sell the Hotel if the employees proceeded with their union activities. All of this evidence warrants the inference that the Respondent's granting of benefits had a motive of discouraging its employees from joining the Union or supporting its organizational campaign. The General Counsel has therefore clearly met the initial *Wright Line* burdens. The Respondent was therefore required to show that it would have granted the benefits even in the absence of union activities.

The Respondent defends its grant of better food for employee meals on the ground that Rish had previously directed the chef to serve hot meals and to use fresher vegetables. The Respondent defends its providing more linen on the grounds that linen-ordering was a seasonal thing, and the Respondent was about to order new linen anyway. The Respondent defends its increase of the allowance for cleaning extra rooms on the ground that, after the May meeting, Rish checked with other hotels in the area that are owned by RB Associates and found that they were paying $5, instead of $3, per extra room. The Respondent offers no defense for reducing the workload of the housekeeping employees (from 13 assigned rooms to 12), and the Respondent offers no defense for granting the employees pre-shift coffee, other than to say that the employees requested these items. Of course, the employees requested the morning coffee and the reduced work load only after Rish asked them why they wanted to be represented by a union. The Respondent's relying on these unlawfully solicited requests, or grievances, is an effective admission of an intent to use the benefits to dissuade the employees from joining or supporting the Union, and it is an effective admission of violation of Section 8(a)(3) in granting those benefits. Moreover, the Respondent's defense that it had previously ordered the new linen for employees to work with, and its defense that it had previously ordered better food for employee meals, rest solely on testimony by Rish that was also cryptic, uncorroborated and incredible. Finally, Rish's (hearsay, uncorroborated) testimony that he found out that other hotels owned by RB Associates were paying their housekeeping employees $5 per extra room is not a defense under any case authority or theory of law; Rish did not take the trouble to find out what other hotels were paying until he found out that the employees might be interested in union representation. Accordingly, I find and conclude that the Respondent violated Section 8(a)(3) by granting employees benefits in order to dissuade them from supporting the Union in its organizational attempt.

B. Discharge of Osorio

Luis Osorio worked as a waiter in the Hotel's restaurant from 1996 until he was discharged by Rish on June 19, 2003. At the time of the discharge, Rish told Osorio that he was being terminated because, on May 11, he had violated the Respondent's rules for employees who are clocking in or clocking out. The General Counsel contends that the real reason that the Respondent discharged Osorio was that, on June 15, Osorio approached an admitted supervisor to present a complaint on be-

[6] *MacDonald Machinery Co.*, 335 NLRB 319 (2001), as cited by the Respondent, is not to the contrary. In that case, the employer proved (with extensive testimony) that it had established a practice of soliciting and addressing grievances before any organizational attempt began.

[7] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

[8] *Clock Electric, Inc.*, 338 NLRB 806 (2003).

half of another employee about that employee's being threatened with discharge by her supervisor and to present to that supervisor other employee grievances. Alternatively, the General Counsel contends that the Respondent discharged Osorio because he was active on behalf of the Union during its organizational attempt. The Respondent defends the action on the ground that Osorio did, in fact, violate its clock-in/clock-out rules on May 11, and it denies knowledge of any union activities in which Osorio may have engaged. The General Counsel replies that, even if Osorio did violate the clock-in/clock-out rules on May 11, the Respondent's discriminatory motive is revealed by its delay of discipline until after Osorio engaged in protected concerted activity. The Respondent contends that the delay was caused by the time necessary to investigate the offense, and to convene the supervisors concerned, before making the decision.

1. Facts

Miguel Cordova, an organizer who is employed by the Union, testified that he was the "lead organizer" for the Union's 2003 drive among the Respondent's employees. Cordova testified that Osorio called him on March 22 and set up a meeting (but he did not testify that Osorio's call was the initial contact between the Union and the Respondent's employees). The Union conducted about 20 meetings of employees during the summer, and Osorio attended "90 percent" of those meetings. Cordova further testified that the Union established an organizing committee of 15 of the Respondent's employees, and Osorio "was one of the leaders." Osorio and the other members of the committee agreed to distribute union authorization cards among the Respondent's employees, but Cordova cautioned them to "do it outside the property." Osorio testified that he solicited employee signatures on authorization cards, but away from the Respondent's premises. There is no evidence that the Respondent's supervisors became aware of Osorio's activities on behalf of the Union before his discharge.

The Respondent's restaurant is located in a building that is adjacent to, but separate from, the hotel building. Osorio testified that his usual practice when reporting for work was to drive down a ramp of the hotel building, go inside where the timeclock was located, clock in, return to his automobile, park on the street, go into the restaurant building, change into his uniform in a locker room, and then go to work. The Respondent's employees do not have paper time-cards. Rather, they have coded permanent cards which they swipe through the time-clock, and the hours that they are to be credited are electronically recorded by a central system.

On May 11, which was Mother's Day in 2003, Osorio was scheduled to work a shift from noon until 10 p.m. Osorio clocked in at 11:57 a.m. Osorio had worked the previous day, and he knew that the Mother's Day reservation for a party of 25 had been canceled, and he knew that only 3 reservations, for a total of 6 customers, remained for the day. Osorio testified that when he arrived at the restaurant on May 11 he did not change into his uniform. Instead, Osorio approached Ronald Lineres, the restaurant manager, and asked if he could leave because there was not going to be much business that day. Lineres replied that Osorio could leave then, but he had to return at 4:30 p.m. to help with the dinner service. Osorio agreed that he would. Lineres extracted a second express commitment from Osorio that he would return at 4:30 p.m. because Lineres was not going to be at the restaurant at that time. Osorio gave Lineres the second commitment. Osorio further testified that then, "I just ran out and I completely forgot to clock out." Lineres did not testify.

Osorio further testified that he did return to the restaurant at 4:30 p.m. (a matter about which I have some serious doubt, as discussed infra). Osorio did not clock in for a second time that day (if, in fact, he did return to the restaurant on May 11). Osorio further testified that when he returned to the restaurant he changed into his uniform, but he did no work. Osorio testified that he stayed at the bar and telephoned his brother, Jaime (Carlos) Osorio. Jaime, who is also employed as a waiter at the Respondent's restaurant, did not testify. Osorio testified that he asked Jaime to come to the restaurant and work the remainder of Osorio's shift because Osorio was "not feeling good." Jaime agreed to do so if Osorio called Lineres, if Lineres approved, and if Osorio called Jaime back and reported that Lineres had approved. About 5 p.m., Osorio reached Lineres by telephone. Osorio asked Lineres if Jaime could work the remainder of Osorio's shift if Jaime came to the restaurant. Lineres agreed, but he ordered Osorio to wait until Jaime arrived before Osorio left the restaurant. Osorio agreed. Osorio then went to the locker room, changed from his uniform to street clothes, returned to the bar, and sat and waited for Jaime. Osorio further testified that Jaime arrived at the restaurant about 6 p.m., and then Osorio left.

Osorio did not testify that he clocked out about 6 p.m. on May 11 as he left the restaurant (supposedly for the second time that day). His time record shows, however, that he was clocked out, by somebody, at 6:04 p.m. on May 11. Because Osorio had clocked in at 11:57 a.m., that morning, and because he had not clocked out when he left shortly after reporting for his noon shift that day, Osorio received credit for working 6 hours and 7 minutes on May 11, although he had actually done no work at all. Jaime's record for May 11, however, shows that he (Jaime) clocked in at 6:04 p.m. (i.e., the exact minute that Osorio's record shows a clocking out). The General Counsel asked Osorio, and he testified:

> Q. I will just show you R-8 [Jaime's record] and R-5 [Osorio's record]. Now, those documents show that you clocked out at 6:04 p.m. and your brother clocked in at 6:04 p.m.; is that correct?
>
> A. Yes.
>
> Q. Can you explain how that happened?
>
> A. I don't remember.
>
> Q. Well, what do you think might have happened?
>
> A. One ... of us do it. I don't remember.
>
> Osorio acknowledged that he knew that his clocking his brother in, or his brother's clocking him out, was a violation of the Respondent's disciplinary policies.

Mondays and Tuesdays were Osorio's days off at the time. Osorio testified that on Wednesday, May 14, when he reported for work, he was called to Rish's office where he was met by Rish and Laura Gaige, the Respondent's food and beverage

manager. Osorio testified that Rish asked him why he had not clocked out when he left at noon on May 11, but Osorio did not testify what he replied. Further according to Osorio:

> At that meeting Mr. Rish told me because this happened he will ask questions to Mr. Linares, to my brother, and other people and after that meeting we don't get paid for that date. He says, "I am going to write you up."
>
> I said, "Sir, if you have to do it, you have to do it."

Osorio then went back to work, without receiving a written warning (then or at any later time).

Osorio testified that between May 13 and June 15 he spoke to no supervisor about terms and conditions of employment of the Respondent's employees. On Sunday, June 15, however, Osorio spoke to Mustafa Aouli, the Respondent's front desk manager.[9] Aouli did not testify, and the following testimony by Osorio about the June 15 exchanges between the 2 men went undisputed: About 6 p.m., when Aouli was the Respondent's "Manager on Duty," he came into the restaurant for his evening meal. Osorio waited Aouli's table, and the men had a discussion. Aouli and Osorio first discussed the fact that Aouli had previously submitted his resignation and the fact that that evening was Aouli's last shift with the Respondent. Osorio then told Aouli that on June 13 or 14 restaurant employee Alexandria Guillen told him that her supervisor had threatened her with discharge for something that she had supposedly done. Osorio further told Aouli that he had told Guillen and other restaurant employees that they should attempt to secure a meeting with the manager of the human resources department of RB Associates (again, the Respondent's parent corporation), without any of the Hotel's local supervisors being present. Osorio further told Aouli that he had told the other employees that the purpose of such a meeting would be to discuss the threat to Guillen and "to let them know what is going on in the Company, what happens with general management [of the Hotel] and how we get treated ... because today it can be you, tomorrow it can be me or [the] next day it can be somebody else from the restaurant." Osorio further told Aouli that Guillen and the other restaurant employees had agreed with him that such a meeting should be requested. After telling Aouli all of this, Osorio asked Aouli, whose English is better than Osorio's, to compose a letter to the human resources manager of RB Associates requesting such a meeting. Aouli initially agreed to compose such a letter, but later in the evening he met Osorio and told Osorio that he would not do so. (Aouli told Osorio that a letter might get lost and it would be better if Osorio handled the matter by telephone directly, himself. Osorio agreed.)

Osorio worked a shift on Monday, June 16; that day was extremely busy for the restaurant because a reception for a European prime minister was held there. (Osorio, in fact, worked until 1 a.m. on June 16.) June 17 and 18 were Osorio's days off that week. According to Osorio, when he arrived at work on June 19 Gaige escorted him to Rish's office. There, Rish told Osorio that he had made an investigation of what had happened on May 11. Rish told Osorio that he had decided that Osorio had not even come to the restaurant on May 11 because he (Osorio) had not turned in a uniform for cleaning on that date. Rish then showed Osorio a vendor's bill that listed the names of employees who had turned in their uniforms for cleaning on May 11; Osorio's name was not on the list. Osorio insisted to Rish that he had come to the restaurant on May 11 (without saying that he had come there twice). Osorio further told Rish that on May 11 he may not have turned in the uniform that he wore that day because he possessed more than one uniform. Rish told Osorio that he still did not believe that Osorio had come to work on May 11, and he then told Osorio that he was fired. Osorio asked for a "one last chance" because "[t]his is the first time it happened to me." Further according to Osorio:

> He [Rish] said, "No, I cannot give you no more chance here. You no have any more chance here. What I can do for you, we're going to find you another job at another company at another location."
>
> He told me he would make contact with the Manager of the Henley Park Hotel.
>
> He [said that he] would be contacting the manager over there to try to find another job for me because I was a good server, and he was sorry they were going to lose me, but that's the way it had to be done.
>
> (The Henley Park Hotel is another hotel in the District of Columbia that is owned by RB Associates.) Osorio testified that Rish gave him "a bunch" of his business cards and told Osorio to use him as a reference with prospective employers. Osorio asked Rish for a letter of recommendation. Rish replied that he would have one for Osorio during the following day. Osorio testified that Rish added: "Because you come here, you don't work tonight, I'm going to pay you $70 for the day." Osorio thanked Rish for the money, then turned to leave Rish's office. As he walked away, Gaige followed him. Gaige also gave Osorio "a bunch' of her business cards, and she told Osorio: "I'm sorry, Luis. But if there is anything I can help you with, here is my business card. You can use [it] as [for a] reference for [from] me." (None of this testimony was denied by Rish or Gaige.)

On June 20, Osorio returned to Rish's office. Further according to Osorio:

He said "Well, Luis, I'm sorry about what happened yesterday, but I don't have any choice. I know you are my favorite waiter, my wife's favorite waiter. There's nothing I can do, but I am going to do for you the letter." He sit at his computer and he start typing the recommendation letter for me.

On Hotel stationery, Rish wrote:

> To Whom It May Concern:
>
> Luis Osorio was employed at the Garden Cafe at the State Plaza Hotel from October 6, 1996, until June 19, 2003, as a server and bartender. During his tenure, Luis proved to be a valued member of our team, displaying the utmost care and commitment to service. I would recommend Luis for any position he decides to embark [upon?].

[9] The complaint alleges, and the Respondent admits, that Aouli was a supervisor within Sec. 2(11) of the Act, and that he was the Respondent's agent within Sec. 2(13) of the Act, "until on or about June 16, 2003."

> Should I be of any assistance to you, please contact me directly at [telephone number].
>
> Rish signed the (undated) letter as the Respondent's general manager.

Further on direct examination, Osorio testified that during a 6-month period of 2002, Rish made him acting restaurant manager when the previous food-and-beverage manager was fired. When asked what he did as acting manager, Osorio testified: "Do everything for the restaurant, orders, banquets, schedules, payrolls, inventories, everything that normal managers do, general managers do."

On cross-examination, Osorio testified that, although each employee has his own permanent time card with which to clock in and clock out, the cards are left by the employees at the time-clock (which, again, is in a building separate from that of the restaurant). Osorio testified the employees leave their cards at the clock "so we don't lose the cards." I felt constrained to ask (and I felt constrained to thereafter comment):

> JUDGE EVANS: Did you give your -- did you tell your brother to punch in for you, or punch out for you, on May the 11th?
>
> THE WITNESS: I don't remember.
>
> JUDGE EVANS: You don't remember?
>
> THE WITNESS:: I don't remember. When you asked me that, I don't know.
>
> JUDGE EVANS: But if you did such a thing, you would remember it, wouldn't you?
>
> THE WITNESS: Yes, sir. I was trying to figure out that, but I couldn't remember.
>
> JUDGE EVANS: So, are you telling me--Sir, do you realize you are under oath?
>
> THE WITNESS: Yes, sir.
>
> JUDGE EVANS: And you have no idea how your brother and you could have both punched the clock at 6:04 p.m. on May 11th?
>
> THE WITNESS: That's what I don't remember, if it was me or was him, I don't really remember, but one of us do it, but I don't know which one do it.
>
> JUDGE EVANS: I'm sorry, sir. I just don't believe you.

The General Counsel had no redirect examination for Osorio.

The Respondent's payroll periods run from Sundays through Saturdays. Gaige reviews the food and beverage department's payroll on Mondays or Tuesdays. On direct examination, Gaige testified that on Monday or Tuesday, May 19 or 20, she reviewed the payroll report for the week of May 11 through 17. She noted that Osorio had been recorded as clocking out on May 11, after working 6 hours, at the same minute that Jaime had clocked in. Gaige testified that it was "nearly impossible" for 2 employees to hit the clock at the same minute. She therefore immediately informed Rish. Gaige testified that, "a couple of days after I received the report," she and Rish questioned Osorio and Jaime about how they could have hit the clock at the same time. Gaige testified that Osorio claimed that he had worked on May 11, but she also testified that she could not recall what Osorio gave as an explanation for his and Jaime's identical clock times. (Gaige was not asked if Jaime offered an explanation.) Gaige testified that Osorio's account made no sense, "so we decided that we would further investigate." (Gaige did not testify what, if any, further investigation that she may have participated in.) Gaige denied knowing before Osorio was discharged that he had favored the Union.

On examination by the General Counsel, Gaige was shown an undated "Employee Communication Record" form that had come from Osorio's personnel file. In a space for "Employee action," there is entered (in handwriting): "On Sunday, May 11, 2003, Luis neglected to check out when leaving property as he left early from his shift." A space on the warning notice for "Employee comments" is blank. In a space for "Performance Expectation" Is written: "Luis knows the importance of clocking in and out when leaving the property and will continue to do so each time. Failure to do so will result in suspension/termination." Gaige acknowledged that she made the handwritten entries on the form. When asked why she wrote "[f]ailure to do so *will* result in suspension/termination" Gaige replied:

> After Mr. Rish and I spoke to Luis regarding May 11th, we were pending an investigation, so I just wanted to kind of write a little something as to what we spoke about, pending further investigation. . . . It was kind of my verbiage of, it's pending investigation, and upon investigation, if the results come out as such, termination or suspension will result.

Gaige acknowledged that she and Rish signed the undated form.

Rish was first called to testify by the General Counsel who examined him as an adverse witness. Rish acknowledged that no other waiter was ever asked to assume the duties of the restaurant manager, as was Osorio in 2002. Rish further testified during the General Counsel's examination that Osorio was terminated "solely on the events that took place on May 11th" and that other discipline in his file "wasn't considered in this decision to terminate him."[10] Rish acknowledged that Respondent uses the "Employee Communication Record" form for written warning notices and reprimands under its written progressive disciplinary system, which system provides for punishments ranging from "verbal counseling" to discharge. Rish acknowledged his signature on the undated "Employee Communication Record" that is quoted above, but he disclaimed memory of "the time frame or the context for which this was created."[11]

When examined by the Respondent's attorney, Rish denied knowing that Osorio had engaged in any union activities or that he had held prounion sympathies. Rish identified a termination notice that he created for Osorio's file. The effective date is "6/19/03." In a space for "Reason (Be Specific)," Rish wrote: "Falsif[ied] time card. Luis did not work on 5/11/03." In a section for "Comments," Rish wrote: "Luis is a good server. When

[10] Gaige was examined by the Respondent's counsel about certain warning notices that Osorio had been issued before May 11. Because of this concession by Rish, discussion of those notices is unnecessary. (Also, any theoretical effect of Gaige's testimony about Osorio's prior warning notices was effectively dissipated by the General Counsel's cross-examination.)

[11] The transcript, p. 33, LL. 7–8, is corrected to change "in the second sentence you say, 'For this review only. Luis knows" to "in the second sentence you say, for this review, only: "Luis knows."

confronted, he attempted to lie his way out. He came in, left and came back and clocked out. Witnesses were Mustafa Aouli, Ellery & Sharif." Rish testified that during his investigation of the matter Aouli had told him that he did not see Osorio on May 11, but Ellery _____ (a chef) and Shariff _____ (another waiter) told him that they had seen Osorio at the restaurant's bar during the afternoon of May 11, in street clothes, although they could not recall what time it had been when they had seen Osorio. Rish did not testify when it was that he spoke to Aouli, Ellery or Sharif. Rish also testified that he spoke to Lineres, but he did not testify when he did so. Rish testified only that Lineres had stated that he had excused Osorio to leave shortly after noon on May 11 if he would come back later to work.

When asked on direct examination why it took from May 11 until June 19 to discharge Osorio, Rish responded:

There are two reasons. It took some time, again, for scheduling and talking to people throughout the investigation. Secondly, we didn't want to talk to -- The two people in this questioned were Jaime, or "Carlos," [Osorio] and Luis Osorio, obviously brothers. We did not want to question them separately. We wanted to do it together. So, having Laura's schedule, my schedule and those two schedules all work out did take some time.

When a decision was made that we had a terminable offense we were going to then go down two servers. We had, as noted earlier, released Mahamadou Ly from employment. It was more of a business decision to decide if we needed to hire some more servers before we let Luis go.

According General Counsel's Exhibit 9 (rejected, but to which Rish referred in his testimony), Ly had been terminated on March 12.

Rish identified a May 11 "Employee Sales and Tip Totals" sheet for all employees. The sheet reflects no sales or tips for Osorio, but it shows that Jaime had about $1800 in sales, and about $275 in charged tips, during the hours that he worked that date. (As well as clocking in at 6:04 p.m. on May 11, the Respondent's records show that Jaime clocked out at 10:42 p.m.) Rish testified that when he confronted Osorio and Jaime:

Luis and Jaime both explained that Luis called Jaime to come in to finish his shift, as Luis wanted to go home. That in itself was no big issue. So, apparently, according to what was informed to me was [that] Jaime came in, punched in, went to the restaurant, let Luis know he was there, Luis then said okay and left, went down and punched out and Jaime continued to work and Luis went home.

Rish testified that "Luis's and Jaime's [story] did not make sense" because the timeclock is distant from the restaurant. Rish testified that, during his investigation of the matter, he timed a brisk walk from the timeclock to the restaurant, and it took a full 3 minutes. Rish further testified (and Osorio did not dispute) that at no point before Osorio received a check that included 6 hour's pay for May 11 did Osorio come to him and admit that he did not work that day.

Finally, to prove consistent treatment of similarly situated employees, and to show that investigations of such matters take a long time, the Respondent introduced evidence regarding former employees Ryan De Los Trinos and Carme Reyes. De Los Trinos was discharged on August 12, 2002, because Rish caught him hanging around the Hotel after work when he had not yet clocked out. Rish confronted De Los Trinos at the time, and De Los Trinos lied to Rish by insisting that he had already clocked out when he had not done so. Reyes was discharged on December 10, 2003, for having another employee clock her out about 2 hours after Reyes had left the premises on November 22. Rish testified that he talked to one supervisor and one other employee, as well as Reyes, when he investigated the matter, but he did not testify why it took about 3 weeks to handle the matter.

To demonstrate disparate treatment of Osorio, the General Counsel introduced records of, and testimony through Rish about, other employees. According to the Respondent's records, on March 23, 2002, Aouli issued an oral warning to employee Joelaida Barcia about having someone else clock her out. On March 28, 2002, Assistant General Manager Hussein Ahmed caught employee Fabio Coutinho clocking out Barcia. Coutinho was given an oral warning and Barcia was discharged because she "had been warned three days earlier of the consequences of her actions," according to a personnel-file memorandum by Rish. I do not credit Rish's hearsay testimony that the specific March 23, 2002, warning that is referred to in the memorandum was only a general warning to the department's employees. Moreover, although Rish testified that Coutinho told the truth during the investigation, he did not, as asserted by the Respondent on brief, testify that Coutniho's truthfulness is the reason that he was not disciplined over the event.

Employee Courtney Steele failed to clock in or out for the entire week of May 18, 2003. Steele was given a written warning that if she failed to do so again she "will be" suspended or discharged. Osorio received no such warning, but the General Counsel did not show that Steele failed to work all of the hours for which she was paid.

Employee Merghani Sharif was issued a warning notice on August 4, 2002, for "excessively missed punches." The notice states that "Failure to do so will result in suspension and/or termination." Again, Osorio received no such warning, but the General Counsel did not show that Sharif claimed, or was paid for, hours that he did not work. The General Counsel also showed, however, that on August 23, 2002, Gaige suspended Sharif for 3 days for using a manager's code number to void a customer's check. Gaige noted on the form that Sharif "has been warned in the past of using other employee numbers without authorization."

Finally as evidence of disparate treatment of Osorio, the General Counsel relies on the fact that the Respondent did not punish Osorio's brother Jaime for his apparent part in the events of May 11. When the General Counsel questioned Rish as an adverse witness, Rish testified that Jaime received no discipline because, although he suspected Jaime of wrongdoing, "[t]hat would be just purely a guess on my part."

2. Conclusions on Osorio's discharge

The complaint alleges that the Respondent violated Section 8(a)(3) because it discharged Osorio for engaging in union activities, or that it violated Section 8(a)(1) because it discharged him for engaging in protected concerted activities, or

both. Under *Wright Line*, supra, the first question before the Board is whether the General Counsel has come forward with evidence that the Respondent knew of, and that the Respondent was at least in part motivated by, union activities or protected concerted activities in which Osorio had engaged. Osorio testified that after he contacted the Union he distributed authorization cards to other employees, and Osorio testified that he attended union meetings. Osorio, however, acknowledged that he conducted his card-soliciting activities and other prounion communications away from the Respondent's premises, and the General Counsel adduced no evidence that the Respondent's supervisors came to know of those activities before he was discharged. As well, Rish and Gaige denied any knowledge of any such union activities by Osorio, and those denials were credible. I shall therefore recommend dismissal of the allegation that the Respondent discharged Osorio in violation of Section 8(a)(3). The alleged violation of Section 8(a)(1), however, raises different considerations.

An employee's presentation of commonly held grievances to a member of supervision is the consummately representative example of concerted activities that are protected by Section 7 of the Act. On June 15, Osorio presented to Aouli, Rish's counterpart on the evening shift,[12] grievances involving a threat to employee Guillen and involving "how we get treated." As well, Osorio asked Aouli to draft for the employees a letter to the human resources manager of the Respondent's parent corporation requesting a meeting with the employees *without local managers such as Rish being present*. On brief, the Respondent contends that, because June 15 was Aouli's last day at work, it is unlikely that Rish came to know before Osorio's discharge that Osorio had presented the employees' grievances to Aouli. This argument would have at least superficial plausibility if it were being advanced in support of a denial by Rish. However, although Rish and Gaige fervently denied any knowledge of Osorio's union activities, neither denied knowing before Osorio's discharge that he had presented the employees' grievances to Aouli. In absence of credible denials, the knowledge of admitted Supervisor Aouli is readily imputable to the supervisors who were involved in the discharge.[13] I therefore find that the General Counsel has proved the element of knowledge that is necessary under *Wright Line* to support an inference of unlawful discrimination in violation of Section 8(a)(1).

I also find that the General Counsel has proved that the Respondent bore animus toward Osorio's protected concerted activity. Osorio was not fired the day that immediately followed his presentation of grievances to Aouli. That day, June 16, was extremely busy for the Respondent because there was a reception for a European prime minister at the restaurant. Because Osorio worked past midnight, the reception was apparently an "all hands" operation that required such good waiters as Osorio[14] to be on the job. Osorio was off on June 17 and 18; then he was discharged on June 19, his second work-day after his presentation of grievances. The Board has held that where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). I find that the inference is properly drawn in this case, and it is fortified by the feebleness of the Respondent's excuse for the delayed-action discharge of Osorio.

Rish testified that he delayed discharging Osorio until June 19 because he wanted to talk to Osorio, Jaime and Gaige together and that "having Laura's schedule, my schedule and those two schedules all work out did take some time." However, Gaige testified that it was on May 19 or 20 that she discovered that Osorio and Jaime's records for May 11 showed the same minute for Osorio's clocking out and Jaime's clocking in, and Gaige testified that she reported the matter immediately to Rish. Logic for a proposition that management could not schedule two employees to meet with two supervisors within at least a week is entirely missing. Also missing are any supporting records to show that Gaige, Osorio, Jaime and Rish were not consistently present during the days following Gaige's May 19 or 20 discovery of the obvious discrepancy. Moreover, Rish is belied by the testimony of Gaige who was clear that the "first night" after her discovery and report to Rish, she and Rish confronted Osorio and Jaime about the matter.[15] In summary, Rish's testimonial attempt to explain the Respondent's delay in discharging Osorio for his May 11 conduct is not credible. Also not believable was Rish's testimony that the Respondent needed time to decide if it needed to hire another server because it had previously terminated waiter Ly. Ly was terminated on March 12, some 3 months before it terminated Osorio. If a replacement for Ly was needed, the Respondent assuredly would have known long before it got around to terminating Osorio. And, obviously, a replacement for Osorio was going to be needed; he must have been the best waiter that the Respondent had because none other was made an acting supervisor or manager, as Osorio was in 2002. Therefore, what the Respondent on brief casually refers to as "personnel problems" could not have been part of a reason for the delay in disciplining Osorio for his conduct of May 11.[16] There being no legitimate explanation for the Respondent's delay in discharging Osorio until immediately after his protected concerted activity of June 15, I find that the timing of that discharge provides the element of animus that is required by *Wright Line*.

The requisite elements of knowledge and animus having been established, the burden is shifted to the Respondent to

[12] Rish testified that Aouli "is responsible for the Hotel during the 3 to 11:p.m. hours, just as I was in the morning when I was on property."

[13] See, for example: *Woodlands Health Center*, 325 NLRB 351, 361 (1998) (relevant knowledge imputed to employer because supervisor who testified did not deny seeing alleged discriminatee wearing prounion insignia).

[14] As Rish wrote in his letter of recommendation, Osorio was a "valued member of our team." Or, as Rish wrote on the Respondent's dismissal form: "Luis is a good server."

[15] Oso/ was credible in his testimony that it was on May 14 that Rish and Gaige confronted him and Jaime about the May 11 matter.

[16] I told Osorio on the record that I did not believe his testimony that he could not recall whether it was he or Jaime who hit the clock for both employees on May 11. I regret that I did not have the prescience to tell Rish on the record that I did not believe him either.

show that it would have discharged Osorio even absent his protected concerted activities of June 15.

On May 11, Osorio clocked in at 11:57 a.m. Osorio testified that he got permission from Lineres to leave almost immediately thereafter, and that he did so, but he "forgot" to clock out. Osorio testified that he returned to the restaurant about 4:30 p.m. If he did so,[17] he did not clock back in.[18] Somehow, Osorio caused himself to be clocked out at 6:04 p.m., and he accepted pay for working those 6 hours even though he acknowledges that he did not do so. That is, Osorio stole from the Respondent on May 11, but that fact hardly ends the inquiry.

Gaige described the phenomenon of two employees' hitting the clock during the same minute to be "nearly impossible." But, given the story that Osorio and Jaime gave Rish and Gaige on May 19 or 20, it was not just "nearly impossible"; it was absolutely impossible. Gaige testified that "on the first night" that she discovered the identical time records of Osorio and Jaime, which I find was May 14, she and Rish confronted the brothers. Therefore, Rish had the records in hand when Osorio and Jaime told him that Osorio had waited for Jaime to come to the restaurant before Osorio left to go to the next building and clock out. Rish knew that that story was a lie the instant that he heard it. Although Rish testified that he later timed a brisk walk from the timeclock to the restaurant at 3 minutes, he necessarily knew when Osorio and Jaime gave their story that it was absolutely impossible for one employee to leave the restaurant and clock out in another building during the same minute that a second employee clocked in at the other building, if the first employee had waited for the second employee to arrive in the restaurant before he (the first employee) had left the restaurant. Rish's testimony that "Luis's and Jaime's [story] did not make sense" was therefore more than a vast understatement. Of course, if Rish had acknowledged that the brothers' story was the palpable lie that he necessarily knew it to have been, he would have cut himself off from his explanation that the discharge was delayed by the weeks that were consumed in "investigating" the matter.

That is, Rish knew all that he needed to know on May 19 or 20, when Gaige presented him with the time-clock records and he heard the employees' impossible explanation. Nevertheless, Gaige composed, and Rish signed, nothing more than a form memorandum to Osorio's file. The Respondent has separate forms for warnings and for discharges; Gaige and Rish selected the form for a warning. In the plainest of language, Gaige and Rish noted only that Osorio's "Performance Expectation" was that "Luis knows the importance of clocking in and out when leaving the property and *will continue to do so* each time. Failure to do so will result in suspension/termination." (Emphasis added.) The terms "will continue" and "[f]ailure to do so" are obvious references to the future. The past was being dealt with inside the four corners of that memorandum.[19] The mater was shelved with that warning notice (which the Respondent did not even bother to deliver to Osorio), and no more was heard of the matter until Osorio's protected concerted activity of June 15.

Although he did commit a theft, the circumstances of Osorio's discharge nevertheless bring to mind an old (law school) case on condonation. In *Edward G. Budd Mfg. Co. v. N.L.R.B.*, 138 F.2d 86 (3d Cir. 1943), cert. denied 321 U.S. 773 (1943), the alleged discriminatee had once done the employer's bidding as the "representative"of an unlawfully assisted union. While doing such, the employee was allowed all sorts of mischief, as noted by the court:

> The case of Walter Weigand is extraordinary. If ever a workman deserved summary discharge it was he. He was under the influence of liquor while on duty. He came to work when he chose and he left the plant and his shift as he pleased. In fact, a foreman on one occasion was agreeably surprised to find Weigand at work and commented upon it. Weigand amiably stated that he was enjoying it.[6/] He brought a woman (apparently generally known as "the Duchess") to the rear of the plant yard and introduced some of the employees to her. He took another employee to visit her and when this man got too drunk to be able to go home, punched his time-card for him and put him on the table in the [unlawfully assisted union's] meeting room in the plant in order to sleep off his intoxication. Weigand's immediate superiors demanded again and again that he be discharged, but each time higher officials intervened on Weigand's behalf because[,] as was naively stated[,] he was "a representative." In return for not working at the job for which he was hired, the petitioner gave him full pay and on five separate occasions raised his wages. One of these raises was general; that is to say, Weigand profited by a general wage increase throughout the plant, but the other four raises were given Weigand at times when other employees in the plant did not receive wage increases.

[6] Weigand stated that he was carried on the payroll as a "rigger." He was asked what was a rigger. He replied: "I don't know; I am not a rigger."

But when Weigand joined a CIO union, he was promptly fired. The court had no difficulty in upholding the Board's finding of a violation, stating that it "is certainly too great a strain on our credibility to assert, as does the petitioner, that Weigand was discharged for an accumulation of offenses." The principal difference between Weigand and Osorio is that Osorio was, other than his May 11 dereliction, a good employee. The Respondent was willing to let Osorio's all-too-apparent theft of time go with an (undelivered) warning notice until Osorio engaged in the protected concerted activity of presenting the grievances of his fellow employees to supervisor Aouli. Then the Respondent promptly fired Osorio. It is therefore "too great

[17] I do not believe that Osorio did return to the restaurant on May 11; I believe he took advantage of the fact that Lineres was not going to stay that day and simply left with no intention of clocking out. I further believe that the witnesses that Rish contacted either were mistaken or they lied to Rish.

[18] Osorio was not asked why, if he did return on May 11, he did not clock back in; presumably he would have testified that he "forgot" again. I do not believe that he forgot to clock back in any more than I believe that he forgot to clock out.

[19] Gaige's testimony that her plain language "was kind of my verbiage of, it's pending investigation, and upon investigation, if the results come out as such, termination or suspension will result," was another palpable lie.

a strain on [my] credibility to assert," as does the Respondent, that Osorio was discharged for something that had happened weeks earlier. That is, the Respondent's treatment of Osorio after he engaged in protected concerted activity was discriminatory when compared with its treatment of Osorio before he engaged in that activity.

Further evidence of discrimination against Osorio is found in the Respondent's treatment of Jaime. Rish knew, immediately, that it was Jaime who swiped both of the identification badges through the time-clock at 6:04 p.m. on May 11. Osorio, who did not work on May 11, had an obvious reason to ask his brother to clock him out; Osorio wanted the money. On the other hand, Jaime worked on May 11, as Rish knew. Rish therefore knew that Jaime would have had no reason to ask Osorio to clock him (Jaime) in. Whether or not Rish suspected that Jaime and Osorio had agreed to split the ill-gotten proceeds, he necessarily knew that Jaime was equally culpable. Rish, however, did nothing to discipline Jaime. The only conceivable distinction is the obvious; Osorio had engaged in protected concerted activities, and Jaime had not.

I further agree with the General Counsel that the Respondent's giving employees Barcia and Coutinho individual warnings for their timecard manipulations before imposing any further discipline upon them is indicative of unlawful discrimination against Osorio who got no such warning. Also, the Respondent's giving Sharif a warning and a suspension for theft by using a manager's code to clear a customer's check without payment is further evidence of disparate treatment of Osorio.

And further evidence that Osorio was not discharged for theft is found in the glowing "To whom it may concern" letter of recommendation that Rish wrote, without hesitation, for Osorio. Rish stated that "Luis proved to be a valued member of our team, displaying the utmost care and commitment to service," thus belying any professed feeling that Osorio had engaged in some inexcusable offense. Moreover, even as Rish fired Osorio, he gave him $70 and told him that the Respondent was "sorry they were going to lose [him]," according to Osorio's uncontradicted testimony. Also, Rish and Gaige gave Osorio their business cards and told him to use them as a reference for future employment. These additional actions are fatally inconsistent with any honestly held belief that Osorio had engaged in an act of theft which the Respondent had not condoned.[20]

In summary, the General Counsel has presented a *prima facie* case that on June 19 the Respondent discharged Osorio in violation of Section 8(a)(1), and the Respondent has not met its *Wright Line* burden of proving by a preponderance of the evidence that it would have discharged Osorio even absent his protected concerted activities of presenting the employees' grievances to Aouli on June 15. I therefore find and conclude that by discharging Osorio the Respondent has violated Section 8(a)(1), as alleged.

CONCLUSIONS OF LAW

1. The Respondent, State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel, of the District of Columbia, is an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting its employees' grievances, by promising to remedy those grievances, by threatening its employees that the Respondent would sell its business if they selected the Union as their collective-bargaining representative, and by discharging employee Luis Osorio because Osorio had engaged in concerted activities that are protected by Section 7 of the Act, the Respondent has violated Section 8(a)(1) of the Act.

4. By granting its employees wage increases and other benefits such as free coffee, more supplies, better meals and lighter work loads, all in order to discourage those employees from becoming members of, or giving assistance or support to, the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.

5. The Respondent has not otherwise violated the Act as alleged in the complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action that is designed to effectuate the policies of the Act. The Respondent must be required to post the appropriate notice to all employees and, because the Respondent unlawfully discharged employee Luis Osorio, it must offer Osorio reinstatement and make him whole for any loss of earnings or other benefits, computed on a quarterly basis from the date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be ordered to expunge from its files all records of the violative discharge of Osorio. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).[21]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

[20] The fact that the Respondent had previously discharged De Los Trinos for similar conduct is irrelevant; the Respondent could have treated any number of employees consistently; the issue is why did the Respondent treat Osorio disparately. The subsequent discharge of Reyes is likewise probative of nothing; the Respondent knew that it had to deal with Osorio's pending unfair labor practice charge as it was dealing with Reyes.

[21] Nothing in this decision, however, shall be construed as requiring the Respondent to remove from Osorio's personnel file the undated "Employee Communication Record," or warning notice, regarding the events of May 11, 2003, because that notice was valid at the time that it was issued.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, State Plaza, Inc., a wholly owned subsidiary of RB Associates, Inc., d/b/a State Plaza Hotel, Washington, D.C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Granting employees wage increases or other benefits such as free coffee, more supplies, better meals and lighter work loads, in order to discourage their activities on behalf of the Union; provided, however, that nothing herein shall be construed as requiring the Respondent to rescind any wage increase or other benefits, or benefit practices, that it has previously granted.

(b) Soliciting its employees' grievances, promising to remedy those grievances, and threatening its employees that the Respondent would sell its business if they selected the Union as their collective-bargaining representative.

(c) Discharging or otherwise discriminating against employees because they have engaged in concerted activities that are protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Luis Osorio full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Luis Osorio whole for any loss of earnings or other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Luis Osorio, and within 3 days thereafter notify Osorio in writing that this has been done and that his discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Washington, D.C., facility copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and to all former employees employed by the Respondent at any time since May 1, 2003, the approximate date of the first unfair labor practice found herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., May 19, 2004.

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit your grievances, or promise to remedy those grievances, or threaten you that we will sell our business, if you select Hotel and Restaurant Employees Union, Local 25, AFL–CIO (the Union), as your collective-bargaining representative.

WE WILL NOT discharge you or otherwise discriminate against you because you have engaged in concerted activities that are protected by Federal Law.

WE WILL NOT grant to you wage increases or other benefits such as free coffee, more supplies, better meals or lighter work loads in order to discourage you from becoming or remaining members of the Union, or in order to discourage you from giving assistance or support to the Union; provided, however, that nothing herein shall be construed as requiring us to rescind any wage increase or other benefits, or benefit practices, that we have previously granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Federal Law.

WE WILL, within 14 days from the date of the Board's Order, offer Luis Osorio full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position with-

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

out prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Luis Osorio whole for any loss of earnings or other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Luis Osorio, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

STATE PLAZA, INC., A WHOLLY ONED SUBSIDIARY OF RB ASSOCIATES, INC., D/B/A STATE PLAZA HOTEL